UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 573

Case No. 627: BHATIA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Brij Mohan Bhatia, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended to 30 October 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 October 1991, the Applicant filed an application containing pleas which read, in part, as follows:

"PLEAS

(a) ...

(b) The Applicant is contesting the decision of the Secretary-General;

(c) The Applicant is invoking specific performance as recommended by the Joint Appeals Board [JAB] and also submits his fresh appeal for monetary compensation for injury sustained;

(d) The matter of compensation was not made an item of appeal in the initial appeal to the JAB, though JAB on its own accord recommended ... US$2,000/-. ...

> The Applicant ... prays for a compensation of US$25,000/- for injury sustained and hardship ...
>
> [and]
>
> (e) A further compensation of a sum equivalent to the difference between the Applicant's salary at the G-6 level to be calculated starting from the date when the promotion would have been effective and continuing until the day of separation, i.e. till 31 July 1991."

Whereas the Respondent filed his answer on 1 June 1992;

Whereas, on 22 October 1992, the Tribunal put questions to the Respondent and on 27 October 1992, he provided an answer thereto.

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 2 June 1964, as a locally recruited Clerk/Typist in the UNICEF Office at New Delhi, India. He was initially offered a three-month short-term appointment at the ND-3 level. He served on a succession of further short-term and fixed-term appointments until 1 August 1970, when he was granted a probationary appointment. On 1 February 1971, his appointment was converted to a regular appointment. During the course of his employment with UNICEF, the Applicant was transferred to the West India Office (WIO) in Bombay, with effect from 17 August 1968. He was promoted to the ND-4 level as Secretary/Stenographer, with effect from 1 July 1968, to the ND-5 level as Senior Secretary, with effect from 1 September 1971 and to the ND-6 level as Senior Secretary, with effect from 1 January 1980. On 1 January 1982, his functional title was changed to Administrative Assistant. Later, the post of Senior Finance Assistant at the UNICEF Office in Bombay, which was encumbered by the Applicant at the ND-6 level, was upgraded to the ND-7 level.

On 29 August 1989, the Division of Personnel issued a Vacancy Announcement to advertise the ND-7 post of Senior Finance Assistant, WIO, encumbered by the Applicant. The announcement was in accordance with the applicable guidelines contained in UNICEF administrative instruction CF/AI/352/Amend.4 and Add.1. The Applicant and another staff member applied for the position.

According to the record, a Selection Advisory Panel (SAP), consisting of a representative of the local General Service Appointment and Promotion Committee (APC), together with a representative from the Division of Personnel and the Applicant's supervisor, met on 21 November 1989, to consider the applications for the post. After reviewing the qualifications of both candidates, the Panel unanimously recommended to the local APC that the other staff member be appointed to the post.

According to the Minutes of the meeting of the General Service APC held on 14 December 1989, "three members of the Committee were of the view that [the Applicant], the incumbent, is a stronger candidate than [the other staff member] and should therefore be appointed to the post, whereas two members were of the view that [the other staff member] be appointed."

In a letter dated 20 January 1990, a Personnel Officer informed the Applicant that he had not been selected to fill the post which he encumbered and which had been upgraded and that the Administration had decided to place him against the post of Administrative Assistant at the ND-6 level, with effect from 1 January 1990.

On 25 January 1990, the Applicant requested the Director of the India Country Office (ICO) to review this decision. In a reply dated 31 January 1990, the Director, ICO, informed the Applicant that the decision would be maintained.

On 23 February 1990, the Applicant requested the Executive Director, under staff rule 111.2, to review the administrative decision not to appoint him to the post of Senior Finance Assistant. In a reply dated 3 June 1990, the Deputy Executive Director informed the Applicant that the decision would be maintained.

On 28 June 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 3 April 1991. Its conclusion and recommendations read as follows:

"Conclusion and recommendations

29. In view of the Panel's unanimous finding that relevant procedures were breached, it concluded that recommendations for redress would be appropriate (...).

30. While noting that the appellant has requested that the JAB Panel recommend his promotion to the post in question, the Panel recalled that the United Nations Administrative Tribunal, when considering the appropriate remedy for redress in the event of its finding that there was a breach of a right to consideration, has held (following its Judgement No. 418, Warner) that it 'cannot ask the Respondent to displace the present incumbent ... or require that the Applicant be promoted ... The Applicant should , however, without being adversely affected by his having appealed in this case, be considered fully and fairly along with other candidates for vacancies ... for which he is found to be qualified and in which he is interested (see Judgement No. 444: Tortel, (1989)). The Panel concluded unanimously that this course of action and financial compensation for injury sustained as a result of the Administration's failure to follow relevant procedures, would be appropriate in the present case.

31. Accordingly, the Panel unanimously recommends that the appellant be given priority consideration for vacancies at the G-7 level for which he is found to be qualified and in which he is interested.

32. The Panel further unanimously recommends that the appellant receive financial compensation of $2,000 for the injury he sustained as a result of breaches of procedure.

33. Because the majority of the Panel (...) felt that serious consideration was not accorded to the appellant's candidacy, it also recommends further compensation of a sum equivalent to the difference between the appellant's present salary at the G-6 level and the salary he would have received had he been promoted to the G-7 level to be calculated starting from the date when the promotion would have been effective and continuing until such time as he is promoted. [a member of the panel] does not support this recommendation, because he felt that it was equivalent to promoting the appellant which the Panel is not competent to grant.

34. The Panel makes no further recommendation in support of the appeal."

On 2 May 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided to reject the JAB recommendations. He stated:

"The Secretary-General's decision not to accept the recommendations of the JAB in paragraphs 32 and 33 of its report takes into account that the Panel erred when it concluded that the Appointment and Promotion Committee did not make a recommendation for promotion as required by the relevant UNICEF administrative instructions. His decision is also based on the following considerations:

(a) recommendations of an Appointment and Promotion Committee are advisory in nature;

(b) the relevant UNICEF administrative instructions expressly envisage that an incumbent of an upgraded post will not necessarily be promoted to that post; and

(c) the obligation imposed on the APC by those instructions to grant the Applicant, who was the incumbent of the post, serious consideration for promotion was discharged and rejection of the Appointment and Promotion Committee's advice, after consideration of its report, constituted a valid exercise of the discretion of the Executive Director."

The Applicant separated from the service of the Organization on 31 July 1991, after accepting an agreed termination.

On 9 October 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent should have followed the APC majority recommendation that the Applicant be appointed to the post.

2. The Respondent did not "seriously" consider the Applicant's candidacy as required by administrative instruction CF/AI/352/Amend.4/Add.1.

3. The Respondent's decision was not taken in accordance with the Organization's relevant rules and procedures.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision to appoint a staff member, other than the Applicant, to a post which had been reclassified was a proper exercise of discretion and was not vitiated by prejudice.

2. Acceptance of an agreed termination precludes additional compensation in connection with that separation.

The Tribunal, having deliberated from 22 October to 11 November 1992, now pronounces the following judgement:

I. The Applicant occupied the post of Senior Finance Assistant at the UNICEF Office in Bombay at the ND-6 level. This post was reclassified to the ND-7 level and, as a consequence, was advertised in an Internal Vacancy Notice as required. Two candidates applied, including the Applicant. The Administration selected the candidate not encumbering the post.

II. The Applicant challenges this decision on the ground that his candidature was not given the "serious consideration" required by paragraph 3 of administrative instruction CF/AI/352/Amend.4/Add.1 of 21 February 1989, that reads as follows:

> "In implementing the provisions under Item 6 of AI/352/Amend.4, the local APC will accord serious consideration to the existing incumbent's performance, experience on the job, relevant qualifications and, where applicable, demonstrated potential while reviewing his/her suitability, together with other candidates, for appointment to the upgraded post."

III. The Applicant contends that the expression "serious consideration" should be construed as granting priority to the incumbent, who should be selected in all cases, except when it could be clearly established that he or she was unsuitable for the post at its new level. The Tribunal grants that, in the context of the administrative instruction, the expression "serious consideration" is ambiguous, since it is evident that all candidates should always be considered "seriously" and not only the incumbent of the reclassified post. However, the Tribunal is unable to concur with the interpretation advanced by the Applicant.

If the Applicant's interpretation were to be accepted, such Vacancy Announcements would, in most cases, cease to have any purpose or meaning, since the new upgraded post would automatically be assigned to its current incumbent, other than in exceptional circumstances. Indeed, this might have been the case originally, when the rules contemplated the possibility of waiving the advertisement of encumbered posts, but that is no longer feasible, pursuant to paragraph 3 of CF/AI/352/Amend.4 of 15 July 1988, which reads as follows:

> "Bearing in mind our budgetary constraints and in order to offer all staff (including the incumbent of the post which has been upgraded) a fair opportunity to apply and compete for a limited number of new/upgraded posts, the provision of recommending to the APC the waiver of advertisement of upgraded posts will cease to be applicable."

IV. It is thus clear that the legal system governing reclassification requires that all reclassified posts should be announced. In consequence, as stated in the above quoted paragraph 3 of CF/AI/352/Amend.4, the system offers "all staff (including the incumbent of the post which has been upgraded) a fair opportunity to apply and compete". In the Tribunal's view, that "fair opportunity" would not exist if the selection process was conducted according to the Applicant's construction i.e. considering first the incumbent of the post and only going on to review the other candidates if the incumbent was found unsuitable.

V. Furthermore, the very wording of paragraph 3 of CF/AI/352/Amend.4/Add.1, on which the Applicant relies, when contending that the incumbent is to be granted priority, leads to the opposite conclusion. It states that the incumbent should be reviewed "together with other candidates for appointment to the upgraded post". As a consequence, the requirement to give serious consideration to the performance and experience of the incumbent when reviewing the candidates for a reclassified post cannot mean that the former should be considered separately and be given preference. On the contrary, although the incumbent's merits and experience should always be borne in mind and taken into account as an important element, all candidates should be considered jointly.

VI. Having reached this conclusion, the Tribunal turned to the question of determining which of the bodies and authorities involved in the selection process were subject to the "serious consideration" requirement.

The selection process comprises first a review of the candidates by a Selection Advisory Panel (SAP), then a review by the Appointment and Placement Committee (APC) and finally a decision by the Head of the Office. The

Tribunal notes, in this respect, that the provisions of paragraph 3 of CF/AI/352/Amend.4/Add.1 refer only to the advisory bodies and are not extended to the final decision of the Head of the Office.

VII. The Tribunal's next task was to consider whether "serious consideration", in the sense defined above, was afforded to the Applicant by the relevant bodies. The Tribunal, having examined the minutes of the SAP and the APC, concludes that the Applicant's experience and performance as an incumbent of the reclassified post were duly considered. The mere fact that three members of the APC favoured the appointment of the Applicant on those grounds shows that, even if their view did not prevail, those factors were seriously considered by the APC.

VIII. The Applicant also contends that the requirements in the Vacancy Announcement concerning previous experience of the candidates and calling for a "6-8 years progressively responsible working experience in the area of Finance" were not met by the candidate finally selected.

The Tribunal, having examined the successful candidate's performance evaluation reports covering the period from 1980 to 1988, has concluded that they constitute sufficient evidence that she had the required experience.

IX. The Tribunal then examined whether prejudice or any other extraneous factor tainted the decisions reached. It came to a negative conclusion, there being no substantial evidence to support the opposite.

X. The Tribunal also examined whether the relevant rules had been followed. In this respect, the Tribunal is unable to concur with the JAB that the APC "failed in its task by not making any recommendation and thus leaving the entire selection process for the sole discretion of the UNICEF Representative."

As stated above, the review process carried out by the SAP and the APC is only of an advisory nature and the discretion of the Administration cannot be viewed as subordinate to the advice given by those bodies. The fact that

no formal recommendation was forwarded by the APC to the Head of the Office in no way makes the latter's final decision flawed or imperfect. The purpose of both reviews by the SAP and the APC is only to provide the Head of the Office with the necessary elements to enable him to reach a decision. In the Tribunal's view such a purpose has been fully achieved in this instance, as shown by the minutes of the meetings held by both advisory bodies. Thus, the lack of a formal recommendation on the part of the APC does not constitute a fundamental flaw of procedure that would call for compensation. Moreover, in view of the Applicant's acceptance of an agreed termination, he would in no event be entitled to any additional compensation related to his termination.

XI. Finally, the Tribunal wishes to point out that, in accordance with its consistent practice, it has confined itself to ascertaining whether the relevant rules and regulations have been observed in this instance. It has excluded any consideration of the respective merits of the candidates, which the Tribunal considers to be outside its competence.

XII. For the above mentioned reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

New York, 11 November 1992

R. María VICIEN-MILBURN
Executive Secretary